No. 12590

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

ERNEST A. TOLIN,
United States Attorney,
WALTER S. BINNS,
Chief Assistant U. S. Attorney,
NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Assistant,
600 U. S. Post Office and Court House Building, Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 12590

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the United States of America, Appellee in the above entitled cause, and presents this, its Petition for Rehearing herein.

Preliminary Statement.

Set forth in the appendix hereto is the decision of the Court herein, filed May 17, 1951.

In their opening brief, Appellants, with respect to the Trial Court's Instruction 19-A, dwelt mainly upon the substantive rule upon which such Instruction was based rather than that it constituted an amendment of the Information so as to charge a separate and distinct offense. The latter

point, it is felt, was not considered in all its ramifications subsequent thereto and in oral arguments; the full purport of the court's decision convinces Appellee that certain legal points and authorities may have been overlooked. This may be found particularly true as to those authorities cited and discussed in Ground II hereinafter.

STATEMENT OF CASE FOR REHEARING.

I.

The Information Is Sufficient to Support the Giving by the Trial Court of Instruction 19-A.

By its opinion the Court has held, in effect, that there was a material variance between the Information as filed and matters sought to be proved at trial, and that the Court's Instruction 19-A, covering certain of such proof, constituted an amendment of the Information so as to charge an additional offense. It is submitted that on a basis of semantics alone, and a fair construction of the words used in said Information, Appellants were sufficiently advised of the gravamen of the offense with which they were charged; and further, that Instruction 19-A, based on *Cerritos Gun Club v. Hall* (9 Cir.), 96 F. 2d 620-624, indicated merely a means or mode by which such offense may be committed.

The Information, in substance, charged the offense in the words of the Regulation and Statute concerned [Tr. 452-455]. That an accusation by such means is sufficient, is settled. (*Norris v. U. S.* (9 Cir.), 152 F. 2d 808, cert. den. 328 U. S. 850; *Eagleston v. U. S.* (9 Cir.), 172 F. 2d 194, cert. den. 336 U. S. 952.) The words used, as the Trial Court instructed the jury [Tr. 452-453], charged, in essence, that on or about October 22, 1949, defendants "did take, hunt, and kill migratory waterfowl and migartory

game birds over ponds and areas which *had been* baited by the means, aid and use of shelled grain, namely, barley, and cracked lima beans, which *had been* deposited, distributed and scattered over the ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds." (Emphasis supplied.) This wording certainly contemplates the possibility of the lures having been present up to just before the season opened and the shooting began, *or* contemporaneously present at the time of the actual shooting; the words "had been" semantically cover either possibility.

Using the words of this Court in *Hopper v. U. S.* (9 Cir.), 142 F. 2d 181, involving a similar situation "* * * the essential elements of the offense are stated, if not directly, certainly by implication." That case also is authority for the well known rule that it is enough if the necessary facts of an offense alleged appear in any form, or by fair construction can be found within the terms of the Indictment.

See:

McCoy v. U. S. (9 Cir.), 169 F. 2d 776 at pp. 779-780.

See also:

Coates v. U. S. (9 Cir.), 159 F. 2d 193;

Stumbo v. U. S. (6 Cir.), 90 F. 2d 828, cert. den. 302 U. S. 755.

And see further:

Fippin v. U. S. (9 Cir.), 162 F. 2d 128;

U. S. v. Wagner (7 Cir.), 143 F. 2d 1, 2, cert. den. 323 U. S. 730.

The latter case cited also calls attention to the rule that a verdict may cure loose or inartificial averments.

The Appellate Court should construe the charge more liberally after judgment than before.

Nicholson v. U. S. (8 Cir.), 79 F. 2d 387.

As stated in *Knight v. U. S.* (8 Cir.), 137 F. 2d 940, the sufficiency of the accusation, in such events, must be judged by practical consideration; "The appellant was under no illusion as to what he was charged with * * *." (P. 942.)

Likewise applicable to the situation at hand is *Newfield v. U. S.* (C. A. D. C.), 118 F. 2d 375, cert. den. 315 U. S. 798, where in considering the sufficiency of an Indictment, the Court said, at page 389:

> "The complaint is against indirect averments. Such defects come within the rule of intendment,—in that a verdict will aid the defective statement of a cause though not a statement of a defective cause * * *. The matter charged to have been indirectly rather than directly alleged was stated in terms sufficiently general to comprehend it in a fair and reasonable intendment."

Here, the essential elements of the charge were (a) Appellants took birds on October 22, 1949, and (b) by means of bait which had been distributed so as to lure them to the area. The fact that the birds may have been lured by virtue of the instinct of returning to an area where bait was present the previous day (actually present

a few hours before shooting began) [Tr. 179-181], *or* by its actual presence contemporaneous with the shooting, was immaterial so long as either situation was shown to have existed, *a fortiori,* where both situations were shown as here. Not unreasonable then was Instruction 19-A since it contemplated one of the mentioned means or modes of committing the offense charged.

That there is a distinction between the gist of the offense charged and the means or mode of committing it is clear. *U. S. v. Turley* (2 Cir.), 135 F. 2d 867, cert. den. *Byrne v. U. S.,* 320 U. S. 715, is a case in point. There defendants were indicted for transporting or causing to be transported in interstate commerce stolen securities. The Court charged that they might be convicted if they were organized to dispose of stolen securities, were willing to do so, and cared not where the property came from, either within or without the State. The theory was that by furnishing a market for such stolen property, the accused thereby caused bonds stolen in another State to be transported to New York as charged. The Appellate Court said this was a fair statement of such a rule set out in a previous case which they had decided. It was said that while the Trial Court could not make deductions or advance theories not warranted by the evidence, it could indicate that the offense charged might be committed in the manner stated.

It is apparent that in the last cited case, the Trial Court was merely citing a *means* of committing the offense. Such was the purport of Instruction 19-A in the case at hand. As in the case cited, the Trial Court was instructing on the

basis of what may be considered a fair statement of the rule of law pronounced in the *Cerritos Gun Club* case, *supra*. A review of that case does not indicate that this Court intended to enunciate a new and separate offense within the terms of the particular Regulation, but rather was stating a means of violating such Regulation.

Further, in considering the distinction between the gravamen of the offense charged and the means of committing it, see *Madsen v. U. S.* (10 Cir.), 165 F. 2d 507, and *Muncy v. U. S.* (8 Cir.), 96 F. 2d 332.

Even more important on this point is the case of *U. S. v. Krepper* (3 Cir.), 159 F. 2d 958, where it was held that a Trial Court may withdraw from the jury's consideration of an offense charged one of the alleged methods of committing it, and that such would not constitute a fatal amendment to the charge. This would appear to be logical authority for the case at hand where a reverse situation might be said to exist. See also, *U. S. v. Segelman* (W. D. Pa.), 86 Fed. Supp. 114; and see *Armour Packing Company v. U. S.*, 209 U. S. 56, 85, involving failure to charge the device by which the crime alleged was committed.

II.

In Any Event, Appellants Were Not Substantially Prejudiced by the Giving of Instruction 19-A.

As already stated, it is apparent by its opinion that the Court has, in effect, found a material variance between the Information and the attempted proof and Instruction 19-A given in connection therewith. It is submitted that even assuming the Information by a fair construction does not semantically support a proof of luring by the means designated in such Instruction, Appellants were not substantially prejudiced thereby; on an examination of the entire record, as is required by *Berger v. U. S.*, 295 U. S. 78, 82, it must be concluded that they were, in fact, sufficiently apprised of the elements of the charge. Cases hereinafter cited directly dealing with the giving of Instructions inconsistent with, contrary to and broadening the formal accusation will, it is believed, lead this Court to such conclusion. It will be apparent that many of the cases already cited, particularly those concerning the means or methods by which an offense may be committed as distinguished from the gravamen of the offense itself, are applicable in the following discussions. For that reason, they are not repeated.

First to be considered however, is the well known test of the sufficiency of an accusation where material variance is claimed by one convicted thereunder. As stated in *Mathews v. U. S.* (8 Cir.), 15 F. 2d 139, the test, briefly, is this: (a) was defendant mislead, and (b) will he be protected against future prosecution for the same act?

With regard to (a) of such test, included is the proposition that the defendant must be sufficiently advised of the charges against him so that he may have ample opportunity to prepare his defense and not be taken by surprise.

U. S. v. Bickford (9 Cir.), 168 F. 2d 26;
Pinella v. U. S. (4 Cir.), 140 F. 2d 271;
Meyers v. U. S. (2 Cir.), 3 F. 2d 379;
U. S. v. Remington (2 Cir.), 64 F. 2d 386.

The last cited case further states the rule that, with reference to (b) of such test, extrinsic evidence is later admissible to identify the crime with which defendant was previously charged; there, a Prohibition Agent had been charged with accepting a bribe on a certain date at certain premises, but the proof showed the premises were located at a completely different place. Likewise, in the case at hand, the actual taking or shooting of migratory waterfowl is the *sine qua non* of the offense. The luring, however achieved, must be in connection therewith. There was but one taking charged, namely—on October 22, 1949 [Tr. 452]. Proof of this would bar any subsequent prosecution for the same act.

> "In other words, if the Indictment is sufficient, evidence which meets its allegations and proves something more without proving an offense different from that which is charged, cannot make a variance between the probata and the allegata."
>
> *Goldberger v. U. S.* (3 Cir.), 4 F. 2d 10, 12.

See also, *U. S. v. Remington* (7 Cir.), 176 F. 2d 321, cert. den. 338 U. S. 893, rehear. den. 338 U. S. 940, cert. den. 340 U. S. 826, where defendants were charged with wilful evasion of income taxes by omitting from ordinary

income dividends received, but the proof showed that they failed to report money received from overceiling sales of whiskey. The Court there held that defendants were not surprised; that the gravamen was wilful intent to evade and defeat. In the case at hand, the proof of luring by means of bait present contemporaneous with actual shooting was, in part, established by evidence that the lure was present a few hours before the shooting [Tr. 179-181]; the same proof could establish violation by means of luring birds to the area up to just before the season opened, and then taking them on the opening of the season. Thus, the Appellants here could not have been surprised or mislead.

The case of *Hopper v. U. S., supra,* 142 F. 2d 181, also emphasized the above discussed rule regarding test of the sufficiency of an accusation, and is persuasive here because it also was a rehearing of a previous decision which had determined the particular Indictment to be insufficient. The Court there fully discussed the rule involved, and reversed its former decision.

Also to be noted is the general statement in *U. S. v. Rabinowitz* (2 Cir.), 176 F. 2d 732, reversed on other grounds, 339 U. S. 56, where the Court stated it is only necessary that the accused be well enough apprised of the crime charged to prepare his defense, which may be done by means other than the Indictment.

The attention of the Court is invited to the following decisions which covered situations where the Trial Court had by its Instructions confused, contradicted or broadened the charge made in the accusation, or had made reference to a violation other than that charged. Most of these decisions reflect the rules above discussed concerning mate-

rial variance, but go further and hold that there was no substantial prejudice resulting from the situations involved. All would seem applicable here.

In *Malatkofski v. U. S.* (1 Cir.), 179 F. 2d 905, the Indictment charged that the defendant unlawfully gave money to an employee of the United States, intending to influence him in the awarding of certain contracts. The evidence showed the employee did not award any contracts, but only made certain direct purchases of goods; the Court held this was not variance. However, the Trial Court had instructed that the defendant may be found guilty if the money was handed over as a gift *or* as a loan, if the requisite intent was found. A loan would be another and separate violation under the statute. In this regard the Court held that in any event, the point was unimportant because any variance was inconsequential; that the defendant could not be said to have suffered any prejudicial surprise, nor were his substantial rights affected in any other respect. It went on to say:

> "It is perfectly clear that whether the handing over of the money was as a gift or as a loan, Malatkofski cannot be prosecuted again for the crime of bribery incident to this transaction." (P. 917.)

The case of *U. S. v. Wodiska* (2 Cir.), 147 F. 2d 38, involved an Indictment charging concealment of assets in bankruptcy, namely money, from the Trustee in Bankruptcy. The Trial Court instructed that assets may include money owed to the bankrupt. This was assigned as error. The Appellate Court held such Instruction was correct as a general proposition, and although there was no allegation in the Indictment of the concealment of money owed, as such, it was impossible to understand how the appellant could have been prejudiced thereby.

In *U. S. v. Fleenor* (7 Cir.), 177 F. 2d 482, defendant was charged in two counts with violation of the White Slave Traffic Act, was convicted, and on appeal, conviction was affirmed. On a Motion to Vacate Judgment and Sentence under Section 2255 of Title 18, U. S. Code, available where the sentence imposed is in violation of the Constitution or laws of the United States, the Court held that the Indictment was legally sufficient and went on to say at page 484:

> "Defendant attempts to demonstrate the invalidity of the Indictment by calling attention to certain elements which the Court enumerated in its charge to the jury as constituting the offense charged. We have examined the Court's charge, and in some respects what the defendant asserts is true, but even so, *the validity of the charge contained in the Indictment is not dependent upon the Court's Instructions to the jury. A variance between the charges contained in the Indictment and the Court's Instructions to the jury might constitute error, which, like any other error committed by the Trial Court would be subject to review. But such error would not affect the defendant's constitutional rights or render the Judgment void.*" (Emphasis supplied.)

The Court said further that the errors complained of would not have been prejudicial even if they had been raised on a formal appeal.

In *Bullard v. U. S.* (4 Cir.), 245 Fed. 837, concerning a charge of unlawful distilling of spirits, to-wit, whiskey, the Trial Court gave an Instruction authorizing conviction on proof of distilled "rum, brandy or whiskey." This was claimed as error, but the conviction was affirmed.

In *Brickey v. U. S.* (8 Cir.), 123 F. 2d 341, the appellant had been convicted of making or causing to be made a false entry in the report of a bank insured by the Federal Deposit Insurance Corporation. As President of the bank, he was indicted along with another who had been cashier. The latter pleaded guilty. The proof showed that the cashier prepared the report and the President merely signed it. The Court instructed that appellant could be convicted under the Aiders and Abettors Statute. On appeal, this was claimed as error. It was clear, stated the Appellate Court, that appellant, being an officer of the bank, could be convicted as a principal, that he was so charged although there was no allegation that he aided and abetted the cashier. It then went on to say:

> "For this reason, it is said the Instruction permitted the jury to convict the appellant of a crime of which he was not charged. The Instruction was unnecessary, but entirely without prejudice to the appellant. It added no burden and required no prejudicial finding. The evidence warranted a conviction as principal under the Indictment as clearly without the Instruction as it did with it. Had he been indicted as an aider and abettor, he could have been convicted as a principal. * * *" (P. 346.)

In *Neill v. U. S.* (5 Cir.), 41 F. 2d 173, defendant, a postal clerk, was charged with converting money deposited in his hands to pay postage due stamps under his control and received in the execution of his office as such postal clerk. The Trial Court instructed the jury that if without

any special authority of the Postmaster and without any statute or regulation of the Post Office Department, a custom had grown up, including in the particular post office, for the clerk in charge of postage due mail to receive from patrons such deposits and purchase therewith postage due stamps, and with them pay postage due on mail matter of such patrons, this would give rise to a duty for such clerk to receive such money or deposits. The Appellate Court upheld the conviction, and said that whether the money did or did not come into his hands or under his control in the execution of his employment or office, he was not harmed by the Instruction as the uncontroverted evidence showed that if it did not thus come into his possession or under his control, it did or must have come into his control under color of his office, which latter the Court found within the meaning of the Indictment.

Also in connection with the giving of Instructions broadening the accusation, where the Appellate Court upheld conviction, see *Griffith v. U. S.* (7 Cir.), 261 Fed. 159, cert. den. 252 U. S. 577; also, *Weldon v. U. S.* (C. A. D. C.), 183 F. 2d 832, where the Indictment charged a violation of an Illinois statute concerning indecent acts with children, but the Court instructed on and defendant was convicted of, violation of a Sodomy Statute taken from Maryland law. The conviction was upheld. And see *U. S. v. Turley, supra,* 135 F. 2d 867.

The Court in its opinion, as the basis for its holding herein, has cited *Edgerton v. U. S.* (9 Cir.), 143 F. 2d 697.

It is submitted that this case is distinguishable from the one at hand. There, an Indictment was involved rather than an Information. That an Information, in any event, may be amended with less formality and procedure than an Indictment, is well settled. It has been held that one may be convicted on a count added by amendment to the Information even though no arraignment and plea were had on such additional count. (*Muncy v. U. S.* (4 Cir.), 289 Fed. 789; see also, *Frederick v. U. S.* (9 Cir.), 163 F. 2d 536.) In view of the *Muncy* case alone, this Court might well conclude that even if the Information here was amended by Instruction 19-A, to charge another offense, the conviction must stand.

But the *Edgerton* case may be distinguished further. There, an Instruction actually deleted from the Indictment certain allegations as to misrepresentations made by defendants in a scheme to defraud by use of United States mails. The effect was to strike out words limiting such misrepresentations and to broaden them considerably; and the Court regarded the procedure as placing undue emphasis by the Court upon such misrepresentations, possibly causing the jury to believe that the Court itself believed they had been made. This would seem scarcely comparable to the facts of the case at hand. The Appellants were charged with the taking of birds by means of luring. The Court by Instruction 19-A merely indicated one means by which that offense might be committed, or one situation where a violation might result; the evidence, in all events, was the same.

The Trial Court itself affirmatively felt that Instruction 19-A represented the law as pronounced by this Court, and regarded it as a desirable Instruction [Tr. 464]. It may be noted that Appellants failed at that time or at any time during the trial to specify, as the ground for their objection to such Instruction, that it constituted the charging of an additional offense, which they were required to do, *DuVall v. U. S.* (9 Cir.), 82 F. 2d 382.

However, it is submitted that upon the consideration of the entire record of this case, of the points and authorities above discussed, and the fullness and fairness with which all aspects of the case were tried, this Court should conclude no prejudicial error was committed.

WHEREFORE, Appellee respectfully prays that this Honorable Court grant this Petition for Rehearing and that the Judgment of Conviction herein, upon further consideration, be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

WALTER S. BINNS,
Chief Assistant U. S. Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Assistant,

Attorneys for Appellee.

Certificate of Counsel.

I, counsel for the United States of America, Appellee in the above-entitled cause, do hereby certify that the aforegoing Petition for Rehearing of this cause, in our opinion, is well founded and is not interposed for delay.

NORMAN W. NEUKOM,

Assistant U. S. Attorney,
Chief Trial Assistant.

APPENDIX.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt and Edward C. Maxwell, Appellants, vs. United States of America, Appellee. No. 12,590.

May 17, 1951.

Appeal from the United States District Court, Southern District of California, Central Division.

Before STEPHENS and ORR, Circuit Judges, and
FEE, District Judge

JAMES ALGER FEE, District Judge:

Appellants were tried upon an information charging that they did take, hunt and kill migratory game birds over baited ponds and areas by use of shelled grain as a lure, by a jury and convicted. They appeal. In their brief, they recite:

> "The appellants consist of farmers, businessmen and public officials who had either been born or resided for many years in and about the City of Oxnard, Ventura County, California. The appellant, Maxwell, an attorney, had been United States Commissioner for the District, President of the County Bar Association of Ventura County, and had served on the Draft Board. The appellant, Carty, at the time of the trial, was Mayor of the City of Oxnard, which position he had held for six years. He was Past President of the League of California Cities and of

the National Association of Municipal Legislators, and had an interest in conservation work for 30 years, having been president of many sportsmen's clubs, Ventura County Gun and Rod Club, the Southern Council of Wardens, Southern California Sportsmen, and State Sportsmen's Council. In addition, at the time of his trial he was a member of the California Fish and Game Commission, and was such a Commissioner on appointment of two governors. There was uncontradicted evidence of the excellent and good character of the appellants."

Besides this, appellants complain of two errors:

(1) Failure to give an instruction that, if the defendants had been entrapped by the officers, they should be acquitted; and

(2) Inclusion of an instruction that, if the baiting were done prior to the season, a conviction might follow if the birds were thus drawn to the area.

As to the first point, there was no evidence of entrapment. The Court did not err in refusing to give the requested instruction. The evidence does show that the defendants went to great extent to use their influence and the prestige of their social and political positions upon the game wardens, in order to obtain immunity from prosecution. But the jury convicted nevertheless.

The officers did not implant the idea of shooting ducks over a fed lake in the minds of defendants. It was not an original idea, but appellants thought it up as the evidence shows. The jury were entitled to find that there was shelled barley in front of the blinds which at that time and place constituted a lure to the birds. The jury could find

that each of appellants took birds by shooting over a fed lake. The jury could also have found from the evidence that each of appellants knew there was shelled grain which lured the birds at the time and place.

The only difficulty with this is that the agents of the government led the Court into error. They requested and the Court gave an instruction which reads:

> "You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season."

If it be conceded that a possible interpretation of the statute would permit a charge of baiting before the season opened, so as to keep the birds in hunting area to be shot after the season opened,[1] in this case the instruction was erroneous. It was shown by the record that the area had been fed about ten days before with the knowledge and consent of game wardens. But the information made the specific charge that the birds were taken over "baited ponds and areas by means, aid and use of shelled grain." This charge could not be established by proof of a baiting before

---

[1]Cerritos Gun Club vs. Hall, 9 Cir., 96 F. 2d 620, 624; *cf.* Cochrane vs. United States, 7 Cir., 92 F. 2d 623.

season if there were no shelled grain in the area contemporaneously with the shooting. Notwithstanding we believe the jury might have found defendants guilty of the charge as laid, this instruction amended the information and defendants were tried upon a charge different than that which they were called to defend by the language thereof. We cannot therefore speculate upon how much weight the jury may have given to the instruction. This was error superinduced by the agents of the government. Nor is this a technicality. The giving of the instruction constituted a flagrant abuse of due process.[2]

The cause is reversed and a new trial ordered.

(Endorsed): Opinion. Filed May 17, 1951. Paul P. O'Brien, Clerk.

---

[2]See Edgerton vs. United States, 9 Cir., 143 F. 2d 697. "Conviction on a charge not made would be sheer denial of due process." De Jonge vs. Oregon, 299 U. S. 353, 362.